491 A.2d 764
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Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,
v.
James H. ADAMS, Defendant-Appellant.

Submitted March 25, 1985.
Decided April 10, 1985.

***385** SYNOPSIS

Defendant's conviction in the Municipal Court on motor vehicle charge of driving while under the influence of intoxicating liquor was affirmed by the Superior Court, Law Division, Sussex County, and defendant appealed. The Superior Court, Appellate Division, Shebell, J.A.D., held that United States Supreme Court's decision in *Berkemer v. McCarty*, which held that persons subjected to custodial interrogation, regardless of nature or severity of offense which occasioned arrest, were entitled to *Miranda* warnings, would not be applied retroactively to arrest for drunk driving where the decision was a clear break with prior state law, retroactivity would burden administration of justice by requiring retrial or overturning significant number of cases, and risk of coerced or involuntary confessions being extracted in motor vehicle investigations involving drunken driving was minimal.

Affirmed.

West Headnotes

[1] Courts k100(1)
106k100(1)

United States Supreme Court's decision in *Berkemer v. McCarty*, which held that persons subjected to custodial interrogation, regardless of nature or severity of offense which occasioned arrest, were entitled to *Miranda*

warnings, would not be applied retroactively to arrest for drunk driving where the decision was a clear break with prior state law, retroactivity would burden administration of justice by requiring retrial or overturning significant number of cases, and risk of coerced or involuntary confessions being extracted in motor vehicle investigations involving drunken driving was minimal.

[2] Automobiles k355(6)
48Ak355(6)

Evidence was sufficient to support conviction for driving while under influence of intoxicating liquor. N.J.S.A. 39:4-50(a).

****765** ***386** Emanuel Gersten, Sparta, for defendant-appellant.

Richard E. Honig, Sussex County Prosecutor, Newark, for plaintiff-respondent (Kevin D. Kelly, Asst. Prosecutor, Franklin, on letter brief).

***387** Irwin I. Kimmelman, Atty. Gen., Trenton, amicus curiae (Boris Moczula, Deputy Atty. Gen., Trenton, of counsel and on brief).

***386** Before Judges McELROY, DREIER and SHEBELL.

***387** The opinion of the court was delivered by

SHEBELL, J.A.D.

Defendant appeals his convictions in the municipal court and the Law Division on a motor vehicle charge of driving while under the influence of intoxicating liquor (*N.J.S.A.* 39:4-50(a)). He argues that the State failed to prove his guilt beyond a reasonable doubt. He also asserts he should have been given *Miranda* warnings at the time of his initial stop and/or at the time he was taken into custody and further, that the "rights" normally read to a driver prior to breathalyzer testing are constitutionally insufficient.

Defendant was charged at the time the offense occurred on January 14, 1983 and was tried and convicted in the municipal court on January 19, 1984. His conviction after a *de novo* trial on the record in the Law Division

took place on May 31, 1984. He filed his appeal with this court on June 20, 1984.

Defense counsel before the municipal court trial commenced entered a plea of not guilty stating "[o]ne of my defenses, and the basic defense, is that in this type of case, it is necessary for the law enforcement officer to read the Miranda warnings to the defendant."

On July 2, 1984 the United States Supreme Court handed down its decision in *Berkemer v. McCarty,* 468 U.S. ----, ----, 104 *S.Ct.* 3138, 3148, 82 *L.Ed.*2d 317, 331 (1984), holding that a person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards established in *Miranda v. Arizona,* 384 *U.S.* 436, 86 *S.Ct.* 1602, 16 *L.Ed.*2d 694 (1966) regardless of the nature or severity of the offense which occasioned the arrest. The Court went on to hold that temporary detention pursuant to ordinary traffic stops does not constitute "custody" for *Miranda* purposes and that it is only ***388** when a suspect's freedom of action is curtailed to the degree normally associated with a formal ****766** arrest that *Miranda* applies. 468 *U.S.* at ----, 104 *S.Ct.* at 3151, 82 *L.Ed.*2d at 334-35.

[1] Although a determination of the issue of the retroactivity of *Berkemer* might not be necessary for the disposition of this appeal, we choose to rule on the issue inasmuch as defendant raised it in the municipal court and the only reported decision in this jurisdiction is a Law Division opinion which disposes of the issue based primarily upon precedents which deal with the retroactivity of Fourth Amendment rather than Fifth Amendment principles. *See State v. Vega,* 200 *N.J.Super.* 448, 491 *A.*2d 797 (Law Div.1984). In *Shea v. Louisiana,* 470U.S. 51, ------, 105 *S.Ct.* 1065, 1070, 84 *L.Ed.*2d 38, 46-47 (1985) the United States Supreme Court concluded that:

> There is nothing about a Fourth Amendment rule that suggests that in this context it should be given greater retroactive effect than a Fifth Amendment rule. Indeed, a Fifth Amendment violation may be more likely to affect the truth-finding process than a Fourth Amendment violation.

The United States Supreme Court reaffirmed a three pronged test in *Solem v. Stumes,* 465 *U.S.* 638, 104 *S.Ct.*

1338, 79 *L.Ed.*2d 579 (1984) when it considered the retroactivity of *Edwards v. Arizona,* 451 *U.S.* 477, 101 *S.Ct.* 1880, 68 *L.Ed.*2d 378 (1981), another *Miranda* case. The Court there adopted the following three criteria to guide resolution of the retroactivity question: (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards and (c) the effect on the administration of justice of a retroactive application of the new standards. 465 *U.S.* at ----, 104 *S.Ct.* at 1341, 79 *L.Ed.*2d at 587.

In applying the first prong of the test, *Stumes* held that retroactive effect is most appropriate where the new constitutional principle is designed to enhance the accuracy of criminal trials. *Id.* at ----, 104 *S.Ct.* at 1341, 79 *L.Ed.*2d at 587. *Stumes* points out that although the *Miranda* warnings are not entirely unrelated to the accuracy of the final result as are Fourth Amendment rights, neither are the warnings a *sine qua* ****389*** *non* of a fair and accurate interrogation. *Ibid.* If there is doubt as to the voluntariness or reliability of any particular statement, suppression can be ordered without regard to the failure of the police to adhere to *Miranda* requirements. *Id.* at ----, 104 *S.Ct.* at 1342, 79 *L.Ed.*2d at 588. Obviously the same reasoning holds true in a *Berkemer* situation and as the *Stumes* Court pointed out, the *Miranda* decision itself was not retroactively applied. *Ibid.; Johnson v. New Jersey,* 384 *U.S.* 719, 729-31, 86 *S.Ct.* 1772, 1778-79, 16 *L.Ed.*2d 882, 889-91 (1966).

Regarding the second prong, *Stumes* held that retroactivity will be denied where there is justifiable reliance on a prior rule which was different from that announced by the new decision; there must be a clear break with past law. 465 *U.S.* at ----, 104 *S.Ct.* at 1343, 79 *L.Ed.*2d at 588-89. The Court stated:

> When the Court has explicitly overruled past precedent, disapproved a practice it has sanctioned in prior cases, or overturned a longstanding practice approved by near-unanimous lower-court authority, the reliance and effect factors in themselves "have virtually compelled a finding of nonretroactivity." *United States v. Johnson,* 457 US 537, 549-550, 73 L Ed 2d 202, 102 S Ct 2579 [2587] (1982) See also id., at 551-552, 73 L Ed 2d 202,

102 S Ct 2579. [465 *U.S.* at ----, 79 *L.Ed.*2d at 589, 104 *S.Ct.* at 1343]

We find that insofar as the law of this State is concerned *Berkemer* is a clear break with the prior law. We formerly held *Miranda* warnings were unnecessary when dealing with a person arrested for a violation of the motor vehicle laws such as drunken driving. *State v. Macuk,* 57 *N.J.* 1, 15-16, 268 *A.*2d 1 (1970); *State v. Lewin,* 163 *N.J.Super.* 439, 441, 395 *A.*2d 211 (App.Div.1978), certif. den. 81 *N.J.* 58, 404 *A.*2d 1157 (1979), *cert.* den. 444 *U.S.* 905, 100 ****767** S.Ct.* 218, 62 *L.Ed.*2d 142 (1979). We think it is significant for these purposes that prior to *Berkemer* the United States Supreme Court denied *certiorari* of a decision of this court which held that the State could use statements against a defendant, even in its prosecution for a criminal offense, where those statements were obtained from the defendant pursuant to a motor vehicle arrest and without the benefit of *Miranda* warnings. *Lewin,* ****390** 163 *N.J.Super.* at 441, 395 *A.*2d 211. Thus it appears that in the past the United States Supreme Court by inaction has sanctioned in prior cases the New Jersey holdings of *Macuk* and *Lewin. But see Maryland v. Baltimore Radio Show, Inc.,* 338 *U.S.* 912, 70 S.Ct. 252, 94 *L.Ed.* 562 (1950). We therefore conclude that *Berkemer* is a clear break from the prior rule upon which there was "justifiable reliance" by law enforcement authorities in this state.

We consider next the third prong of the balancing test, *i.e.,* the effect retroactivity would have on the administration of justice. In this regard we look to the "significant number" of cases in which the new decision might make a difference and the strong public policy in this state favoring the elimination of drunken and careless drivers from our highways. *See State v. Dyal,* 97 *N.J.* 229, 237, 478 *A.*2d 390 (1984); *Kelly v. Gwinnell,* 96 *N.J.* 538, 545, 476 *A.*2d 1219 (1984). It is obvious that there are probably a significant number of cases which would have to be retried and/or overturned based on a police officer's then good faith questioning of a suspect in custody on suspicion of drunken driving or other traffic violation. Having applied the three criteria of *Stumes,* we conclude that it points in the direction that the new rule announced in *Berkemer* is not to be retroactively applied.

We must next consider the applicability of the holding in *Shea v. Louisiana* on our decision. *Shea* concluded that the holding in *Edwards* was applicable to a pending and undecided direct review of a judgment of conviction although its retroactive application was denied in a collateral post-conviction attack in *Stumes.* In *Shea* defendant's confession to robberies was obtained after his request for counsel. We are satisfied that as it pertains to the truth-finding process in traffic violations "principled decisionmaking" does not require application of the *Berkemer* rule. The risk of coerced or involuntary confessions being extracted in motor vehicle investigations involving drunken driving or lesser traffic violations is minimal. Further, ***391** unlike *Shea,* we are able to state emphatically based on empirical evidence that the prosecution of thousands of motor vehicle violations would be impeded. [FN1] Thus, we conclude that *Berkemer* is not to be applied retroactively in non-indictable motor vehicle violations.

> FN1. According to the Administrative Office of the Courts an average of approximately 3,000 drunken driving cases were added to the municipal court dockets each month during 1984. When *Berkemer* was decided there were approximately 8,900 drunken driving cases and approximately 300,000 moving motor vehicle violations pending in the municipal courts of this State.

The line of non-retroactivity, however, can be drawn in a variety of places such as, applying it only to convictions not yet final, only to trials not yet begun, only to constitutional rights violated after the date of the new decision, or only to those cases where the challenged evidence is sought to be introduced after the date of the decision. In light of the strong public policy against drunken drivers and the desire for highway safety, we hold that the line is to be drawn so that only those defendants whose constitutional rights were violated after the date of *Berkemer* can have the benefit of the new rule. Thus the holding of *Berkemer* has no application to this defendant's case.

[2] Defendant urges that the State failed to sustain its burden of proving every element of the offense beyond a reasonable doubt and that the court erred in accepting

the State's proofs with respect to the validity of the breathalyzer evidence. We have carefully considered defendant's **768 arguments as set forth at length in his brief. In light of the applicable law we are fully satisfied that there is no merit to defendant's remaining contentions. *R.* 2:11-3(e)(2); *State v. Johnson,* 42 *N.J.* 146, 162, 199 *A.*2d 809 (1964); *Romano v. Kimmelman,* 96 *N.J.* 66, 474 *A.*2d 1 (1984).

We affirm.